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**IN THE
COURT OF APPEALS OF INDIANA**

AARON KYLE RICHARDSON,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 53A01-0511-CR-532

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0408-FA-00671

SEPTEMBER 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Aaron K. Richardson appeals his conviction of dealing in cocaine, a Class A felony, Ind. Code § 35-48-4-1.

We affirm.

ISSUE

Richardson presents one issue for our review, which we restate as: whether the evidence was sufficient to sustain his conviction.

FACTS AND PROCEDURAL HISTORY

In August 2004, Officer Shrake of the Bloomington Police Department was contacted by Lori Burks. Burks told Officer Shrake that she was in contact with someone who could deliver cocaine. Officer Shrake agreed to use Burks as a confidential informant and met her outside her residence. When Officer Shrake arrived at Burks' residence, there was an unoccupied Chevy vehicle parked outside. Burks exited her residence and joined Officer Shrake in his vehicle. Officer Shrake searched Burks and then provided her with "buy money" and an audio recorder. Burks re-entered her residence. A few minutes later, Burks exited her residence and got into Officer Shrake's vehicle, and the Chevy parked outside Burks' residence left. At that time, Burks turned over to Officer Shrake the crack cocaine she had purchased and the audio recorder. The Chevy vehicle, in which Richardson was a passenger, was stopped by officers. Upon stopping the car, the officers detected the smell of burning marijuana. The officers searched the car and found, in the passenger seat, fifteen rocks of crack cocaine. A search of Richardson disclosed that he possessed the buy money Officer Shrake had

provided to Burks. Richardson was convicted of dealing in cocaine based upon the cocaine found in the passenger seat of the car, but he was not charged with the sale of cocaine to Burks. It is from his conviction of dealing in cocaine that Richardson now appeals.

DISCUSSION AND DECISION

Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id.* Moreover, we are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

Richardson's sole issue on appeal is the sufficiency of the evidence supporting his conviction of dealing in cocaine. In order to obtain a conviction for dealing in cocaine as a Class A felony in this case, the State must have proved beyond a reasonable doubt that (1) Richardson (2) possessed (3) three grams or more (4) of cocaine (5) with the intent to deliver it. *See* Ind. Code § 35-48-4-1(a)(2)(C) and (b)(1). Here, the evidence at trial shows that it was Richardson in the passenger seat of the Chevy when the police stopped the vehicle. Officer Shrake testified that during the search of the Chevy, the officers found on the passenger seat a feminine hygiene pad that contained 15 pieces of a rock-like substance that were individually wrapped. Richardson indicated to Officer Shrake

that the cocaine did not belong to the driver of the vehicle and when Officer Shrake asked Richardson whether he smoked crack cocaine, Richardson responded in the negative. The State also presented the testimony of a forensic scientist who is employed with the Indiana State Police and who tested the rock-like substance found in the passenger seat of the vehicle. She testified that the substance was cocaine and that the combined weight of the fifteen rocks was 11.35 grams. Additionally, Officer Shrake testified that from his training and experience the individually wrapped rocks are indicative of dealing in cocaine and that the rocks in this case are the common size to be sold on the street. Further, he stated that a typical crack cocaine user does not possess any crack cocaine at any given time because they have a tendency to smoke it as soon as they get it.

Actual possession of an item occurs when a person has direct physical control over the item. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). However, in this case Richardson was not found to be in actual possession of drugs. As a result, the State prosecuted its case against Richardson under the theory of constructive possession. Constructive possession requires both the intent to maintain dominion and control and the capability to maintain dominion and control over the item. *Id.* In order to establish the intent element, the defendant's knowledge of the presence of the item must be demonstrated. *Jenkins v. State*, 809 N.E.2d 361, 369 (Ind. Ct. App. 2004), *trans. denied*. When possession is exclusive, knowledge may be inferred. *Id.* However, if possession is non-exclusive, there must be additional circumstances supporting the defendant's knowledge of the presence of the item. *Id.* Included in these additional circumstances are: (1) incriminating statements by the defendant; (2) attempted flight or furtive

gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) contraband is in plain view; and (6) location of the contraband is in close proximity to items owned by the defendant. *Id.* Capability to maintain dominion and control is established by evidence that the defendant is able to reduce the item to his personal possession. *Id.*

In the present case, the intent element was established by the additional circumstance of the cocaine being in close proximity to Richardson in the car. Indeed, he was sitting on top of it. The capability element was established because the feminine hygiene pad containing the cocaine was in Richardson's seat and was easily within his reach. Moreover, Officer Shrake testified that the pad was not down in the crevice where the bottom cushion and the back cushion meet but was simply sitting in the seat between the two cushions. Thus, Richardson was able to reduce the cocaine to his personal possession. *See Lampkins v. State*, 685 N.E.2d 698, 699 (Ind. 1997) (determining that capability element was established because Tylenol bottle that contained rocks of crack cocaine which was beneath passenger seat in which defendant was sitting, was within reach of defendant).

Therefore, the State showed that it was Richardson that committed this act involving three grams or more of cocaine. The evidence further established that although Richardson did not actually possess the cocaine at the time it was discovered, he did constructively possess the cocaine based upon his intent to maintain dominion and control over the cocaine, as well as his capability to maintain dominion and control over the cocaine based upon his close proximity to it in the vehicle. Finally, the State

presented evidence of Richardson's intent to deliver the cocaine through Officer Shrake's testimony that such a large quantity of cocaine is indicative of dealing, as is the size of the rocks and the individual packaging. Additionally, Richardson's unequivocal statement that the cocaine did not belong to the driver, and his denial that he smokes crack demonstrates his intent to deliver. Richardson's brief focuses on the circumstances regarding the sale of cocaine to Burks and the veracity of her statements. However, the State did not charge Richardson with the sale of cocaine to Burks, and she did not testify at his trial. Richardson's argument is merely a request for us to reweigh the evidence, which we will not do. It is the function of the trier of fact to resolve conflicts in testimony and to determine the weight of the evidence and the credibility of the witnesses. *K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001). We will not disturb the jury's determination.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the State presented sufficient evidence to support Richardson's conviction of dealing in cocaine.

Affirmed.

RILEY, J., and BAILEY, J., concur.